of the period during which they would be entitled to look to their mother for support and accepting the Judge's figure of $200 the contribution she was making to their support and I find these figures add up to $14,500 which is not very different from the Judge's figure of $13,000.

In the circumstances I have come to the conclusion that the appeal is without substance and should be dismissed.

Barakbah C.J. (Malaya) and **Wee Chong Jin C.J. (Singapore)** concurred.

Appeal dismissed.

Solicitors: *Battenberg & Talma; N. A. Christopher.*

KHALID PANJANG & ORS. v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Tan Ah Tah J.) November 11, 1963]

[K.L. — Federal Court Criminal Appeal No. 6 of 1963]

Criminal Procedure—Trial—Commencement of—Mode of—By jury or Judge alone—Criterion—Criminal Procedure Code (F.M.S. Cap. 6), ss. 200, 210 and 225 to 234.

At some stage prior to the commencement of a trial in the High Court the question of the mode of trial must be decided, i.e. whether it is to be by jury or by a Judge alone. The criterion, contained in section 200 of the Criminal Procedure Code is that "in all cases where the punishment of death is authorised by law the accused shall be tried by jury." The only practicable time at which the criterion is to be applied is the commencement of the trial.

Once a trial has been commenced before a jury it can only be terminated, apart from questions of irregularity and so forth, by a verdict of the jury which must be either that the accused person is guilty or not guilty of either the offence with which he was originally charged or any other offences for which he could be convicted on the original charge by reason of the provisions of the Code as a whole.

Cases referred to:—

(1) *Lee Chee Wan & Ors.* v. *Public Prosecutor* [1961] M.L.J. 62.

(2) *R.* v. *Jones* [1918] 1 K.B. 416.

(3) *Lee Ah Cheong* v. *R.* [1958] M.L.J. 242.

FEDERAL COURT.

D. R. Seenivasagam for the 1st and 3rd appellants.

E. K. Yeap for the 2nd appellant.

S. A. Raj for the 4th appellant.

Mohamed bin Yaacob (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment on preliminary point): It is quite clear that at some stage prior to the commencement of a trial in the High Court the question of the mode of trial must be decided, that is to say whether it is to be by jury or by a Judge alone. The criterion is that contained in section 200 of the Criminal Procedure Code:—

> "In all cases where the punishment of death is authorised by law the accused shall be tried by jury."

That is the criterion and regarding the question of the time at which that criterion is to be applied we are of the opinion that, having regard to the provisions of the Code as a whole, the only practicable time that could have been contemplated by the legislature is the commencement of the trial.

I pause here to say that we see no reason whatsoever to depart from anything I said in the case of *Lee Chee Wan & Ors.* v. *Public Prosecutor* [1] that a trial by jury for two capital offences together with a non-capital offence is a nullity. That, however, is to be read in the light of what has just been said, that in our opinion the time at which the criterion is to be applied is the commencement of the trial.

If the criterion be applied as in the present case where there is one charge and one charge only — a charge of murder — it requires that the trial be by jury. And turning to Chapter XXII which deals with trials by jury before the Court of a Judge, and in particular to section 210 and sections 225 to 234, it is clear that once the trial has been commenced before a jury it can only be terminated, apart from questions of irregularity and so forth, by a verdict of the jury which must be either that the accused person is guilty or not guilty of either the offence with which he was originally charged or any other offence for which he could be convicted on the original charge by reason of the provisions of the Code as a whole.

In these circumstances and for these reasons we are of the opinion that what was done in the present case was not legally wrong. We would add, however, and we do hope that what we say will be listened to (and perhaps here it would be more appropriate to express a wish than a hope) that as regards the second appellant although what was done was legally correct it was something that was undesirable.

In the case of *The King* v. *Jones* [2] where an appellant was convicted on an indictment which contained counts for murder and also for robbery with violence, the Court of Criminal Appeal though dismissing the appeal against conviction for murder observed (*per* Lawrence J.):—

> "in a case of murder the indictment ought not to contain a count of such a character as robbery with violence. The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment."

Much the same thing was said by the Court of Criminal Appeal in Singapore in the case of *Lee Ah Cheong* v. *Queen.* [3]

The effect of what we have said therefore is that we consider the grounds of appeal arising from the amendment of the charge in the case of three appellants and the additional charge in the case of the other one are without substance.

Solicitors: *S. Seenivasagam & Sons; Yeap & Yeap; Raj & Co.*

JATI v. AH PAW

[O.C.J. (McGilligan J.) November 30, 1963]

[Sibu — Binatang High Court Civil Application No. 1 of 1963]

Adoption—Dayak ceremony of adoption, "tembang" —Death of adoptive parent—Claim for compensation for maintenance by legal personal representative.

Ten years ago the defendant gave away his 14 day old child to the plaintiff's father, now deceased. When the child was about 5 months old a "tembang" or Dayak ceremony of adoption was held and the child was taken into the family of the deceased as his own son. Until his death, the plaintiff's father supported and maintained the child. The plaintiff, as legal representative of her father, now claims against the defendant compensation for 9 years' maintenance of the child.

Held: as there was no agreement between the plaintiff's father and the defendant as to the payment of maintenance or any authorisation by the defendant to the plaintiff's father to maintain the child on the understanding that he would be reimbursed by the defendant, the defendant could not be held liable for compensation.

APPLICATION.

Parties in person.

McGilligan J.: The basic facts in this case are clear and undisputed.

About 10 years ago a son, later to be called Abol, was born to the defendant, Ah Paw (or Siong Kang Yin) and his wife. When still very young, no more than 14 days old (his exact age at the time does not matter) he was given away by Ah Paw to Ah Paw's friend, Dato anak Gumah.

Dato, who died in November 1962, was the father of Jati, the plaintiff, who sues as his legal personal representative.

When Abol was about 5 months old a "tembang", or Dayak ceremony of adoption, took place. The adoption was not registered and no certificate was issued; there is therefore no legal adoption. Nevertheless, it is quite clear from the fact of the ceremony and the evidence of all the witness, including the plaintiff, that the intention of the defendant was to give up the boy completely, and the intention of Dato was to take him into his family as his own son; whether this was because of Abol's hare-lip or not is irrelevant. There is no evidence of, and it seems certain there was not, any arrangement or agreement for defendant to contribute in any way to the support of Abol.

Dato was married to Imok when Abol was given to him. About 5 years later Imok died. After the mourning period for her was over Dato married Dujong (or Lujong, as defendant calls her). There is no doubt that from the time Abol was given to Dato until Dato's death Dato completely supported and maintained Abol.

The plaintiff claims, as legal personal representative of Dato, compensation for nine years' maintenance of Abol. The cost of this she estimates at $25 a month, her total claim being for $2,700. It appeared from her evidence that she is anxious to have the custody of Abol, but she has not claimed it in this case (indeed she could not have done so as the legal personal representative of Dato), and the Court is here only concerned with the claim for compensation. To the question whether or not Dato (or now his estate) should receive money as compensation for his maintenance of Abol, the events which happened after Dato's death are irrelevant.

This claim can only succeed, in my judgment, if there had been either

(a) an express or implied agreement between Dato and the defendant that the defendant should pay for, or contribute towards, the support and upkeep of Abol while he (Abol) was being brought up by Dato, or

(b) some authorisation, whether express or to be implied, by the defendant to Dato to spend money (and perhaps labour) and to incur expenses in the bringing up of Abol for food, clothing, shelter and medical treatment, on the understanding that for such expenses and expenditure Dato would be reimbursed by the defendant.

It is quite clear that there was no such agreement, no such authorisation, and no such understanding.

It might be argued that because the defendant, as he is the natural father of Abol and there has been no legal adoption, is under a liability imposed by law (Chapter XXXIII of Cap. 62, the Criminal Procedure Code, of 1948 Revised Edition of the Laws of Sarawak) to support and maintain Abol, and because Dato discharged that liability for him — that is, supported Abol — therefore the defendant is legally bound to compensate Dato (or, now, his estate). This argument is not, however, a sound one. Where one man voluntarily and gratuitously does what another is by law compellable to do, he is not entitled — in the absence of agreement between them — to payment, remuneration, reward or compensation for what he has done, despite the fact that he has relieved that other of a legal obligation.

It really comes to this: there was no agreement or arrangement between Dato and the defendant that the latter should pay or contribute anything in respect of Abol's maintenance after Abol was given to Dato. On the contrary, it is very clear that Dato took Abol as his son, assuming the rights, responsibilities and liabilities of a father, while the defendant gave up Abol completely, gave up (or intended to give